

REMARKS

The final Office Action of February 4, 2008, has been received and reviewed.

Claims 1-16 and 18-23 are currently pending and under consideration in the above-referenced application, each standing rejected.

Reconsideration of the above-referenced application is respectfully requested.

Rejections under 35 U.S.C. § 102

Claims 1-16 and 19-23 have been rejected under 35 U.S.C. § 102(e) for reciting subject matter that is purportedly anticipated by the subject matter described in U.S. Patent Application Publication 2002/0044942A1 of Dopson (hereinafter "Dopson").

A claim is anticipated only if each and every element, as set forth in the claim, is found, either expressly or inherently described, in a single reference which qualifies as prior art under 35 U.S.C. § 102. *Verdegaal Brothers v. Union Oil Co. of California*, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). The identical invention must be shown in as complete detail as is contained in the claim. *Richardson v. Suzuki Motor Co.*, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

It is respectfully submitted that Dopson does not qualify as prior art to the claims of the above-referenced application. In order for a reference to qualify as prior art under 35 U.S.C. § 102(e), that reference must have been filed or include a claim for priority to an application that was filed *before* the effective filing date of the claims at issue. A proper claim for priority for the subject matter recited in the claims of the above-referenced application has been made to the September 21, 2000, filing date of U.S. Application Serial No. 09/667,147. Dopson, which was not filed until September 18, 2001, does not include a proper claim for priority to an earlier-filed application.

With respect to claims for priority, M.P.E.P. § 201.11 III (page 200-63), citing title 37 of the Code of Federal Regulations, provides:

the later-filed application must contain a specific reference to the prior application. This should appear as the first sentence(s) of the specification following the title preferably as a separate paragraph (37 CFR 1.78(a)) and/or in an application data sheet (37 CFR 1.76).

The first sentence following the title of Dopson does not include a priority claim. Nor was an application data sheet filed in Dopson. As neither of the requirements reiterated in M.P.E.P. § 201.11 has been met, Dopson is not entitled to the benefit of a filing date that precedes its own September 18, 2001, filing date.

Even though the defect in the claim for priority that has been made in Dopson may be cured, according to M.P.E.P. § 201.11, Dopson cannot be considered to be entitled to a priority date that would qualify Dopson as prior art to the above-referenced application under 35 U.S.C. § 102(e) until that defect has actually been cured. As such, Dopson does not qualify as 35 U.S.C. § 102(e) prior art to the above-referenced application and may not serve as the basis for a 35 U.S.C. § 102(e) rejection of any claim of the above-referenced application.

Therefore, under 35 U.S.C. § 102(e), claims 25-30, 33-41, and 43 are allowable over Dopson.

Even assuming, for the sake of argument, that Dopson did qualify as prior art to the above-referenced application, it is respectfully submitted that an affidavit or declaration of prior invention may be filed pursuant to 37 C.F.R. § 1.131. There are only two situations where filing an affidavit or declaration under 37 C.F.R. § 1.131 is not appropriate: (1) when a rejection is based on a patent or pending application “which claims the same patentable invention as defined in § 41.203(a) of this title...” and (2) when the “rejection is based upon a statutory bar. 37 C.F.R. § 1.131. There have not been any allegations of a statutory bar in the above-referenced application. It has been asserted, however, that the claims of the above-referenced application are drawn to “the same patentable invention” as the claims of Dopson.

It is respectfully submitted that the claims of the above-referenced application are not drawn to the same patentable invention as the claims of Dopson. M.P.E.P. § 2301.03 (page 2300-3) clarifies the “same patentable invention” requirement of 37 C.F.R. § 41.203(a) as follows: “The Office practice and the case law define ‘same invention’ to mean patentably indistinct inventions. ... If the claimed invention of *either party* is patentably distinct from the claimed invention of the other party, then there is no interference-in-fact.” (Emphasis supplied).

All of the claims that remain under consideration in Dopson are limited to processes that include collecting “fertilized eggs laid by [a] bird.” The claims of the above-referenced application are, in contrast, drawn to “method[s] for causing a treated animal to elicit a T-cell mediated immune response.” As methods for *collecting eggs* from a transfer factor source animal are totally unrelated to methods for *causing a treated animal to elicit a T-cell mediated immune response*, such methods are patentably distinct from each other.

Furthermore, by restricting the claims of the above-referenced application from claims that were drawn to methods for obtaining transfer factor (*see* U.S. Application Serial No. 09/667,147, Restriction Requirement of December 20, 2000), the Office has already indicated that the subject matter recited in the claims of this application, methods for causing treated animals to elicit T-cell mediated immune responses, is patentably distinct from a method for collecting transfer factor—the subject matter to which the claims that remain pending in Dopson are drawn (*id.*; *see also*, M.P.E.P. § 802.01).

Therefore, the claims of the above-referenced application and the currently pending claims of Dopson are not drawn to the same patentable invention. As such, it is respectfully submitted that the filing an affidavit or declaration of prior use under 37 C.F.R. § 1.131 would be an appropriate way to overcome the 35 U.S.C. § 102(e) rejections of claims 1-16 and 19-23.

In view of the foregoing, it is respectfully requested that the 35 U.S.C. § 102(e) rejections of claims 1-16 and 19-23 be withdrawn, and that each of these claims be allowed.

Rejections under 35 U.S.C. § 103(a)

Claims 1-16 and 18-22 have been rejected under 35 U.S.C. § 103(a).

There are several requirements in establishing a *prima facie* case of obviousness against the claims of a patent application. All of the limitations of the claim must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 985 (CCPA 1974); *see also* MPEP § 2143.03. Even then, a claim “is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR Int’l Co. v. Teleflex Inc.*, 82 USPQ2d 1396 (2007). The Office must also establish that one of ordinary skill in the art would have had a reasonable expectation of success that the purported modification or combination of reference teachings

would have been successful. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). There must also be “an apparent reason to combine the known elements in the fashion claimed by the patent at issue.” *KSR* at 1396. That reason must be found in the prior art, common knowledge, or derived from the nature of the problem itself, and not based on the Applicant’s disclosure. *DyStar Textilfarben GmbH & Co. Deutschland KG v. C. H. Patrick Co.*, 464 F.3d 1356, 1367 (Fed. Cir. 2006). A mere conclusory statement that one of ordinary skill in the art would have been motivated to combine or modify reference teachings will not suffice. *KSR* at 1396.

Klesius in View of Rozzo

Claims 1, 2, 5, 7, 8, 10-13, 16, and 18-22 are rejected under 35 U.S.C. § 103(a) for being directed to subject matter that is assertedly unpatentable over the teachings of Klesius, P.H., et al., “Adoptive Transfer of Delayed Hypersensitivity and Protective Immunity to *Leishmania* with Chicken-Derived Transfer Factor,” *Poultry Sci.*, 63:1333-37 (1984) (hereinafter “Klesius”), in view of teachings from Rozzo, S.J., et al. “Purification of Transfer Factors,” *Mol. Immunol.*, 29(2):167-82 (1992) (hereinafter “Rozzo”).

Independent claim 1 is directed to a method that includes “administering... a quantity of a composition including an extract of an egg...” The teachings of Klesius are limited to administration of a transfer factor-containing composition including an extract from the spleens of chickens. Klesius, page 1334, first column. The teachings of Rozzo relate to administration of a composition that included affinity purified transfer factor from mice. Rozzo, page 168, first column. As neither Klesius nor Rozzo teaches or suggests a method that includes “administering... a quantity of a composition including an extract of an egg...,” the teachings of these references are inadequate to support a *prima facie* case of obviousness against independent claim 1, or any of claims 1, 2, 5, 7, 8, 10-13, 16, 18, 19, or 22 depending directly or indirectly from independent claim 1.

Like independent claim 1, independent claim 20 is also directed to a method that includes “administering... quantity of a composition including an extract of an egg...” Again, neither Klesius nor Rozzo teaches or suggests a method in which an extract of an egg is administered to

an animal to be treated. Thus, the teachings of Klesius and Rozzo do not support a *prima facie* case of obviousness against independent claim 20, as would be required to maintain the 35 U.S.C. § 103(a) rejection of independent claim 20 and its dependent claim 21.

Klesius in view of Rozzo and Kirkpatrick

Claims 3, 4, 6, 9, 14, and 15 have been rejected under 35 U.S.C. § 103(a) for being drawn to subject matter that is purportedly unpatentable over the subject matter taught in Klesius, in view of the teachings of Rozzo and, further, in view of teachings from U.S. Patent 5,840,700 to Kirkpatrick et al. (hereinafter “Kirkpatrick”).

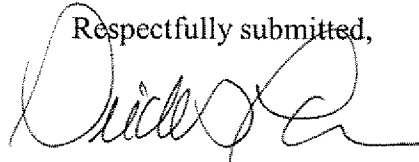
Claims 3, 4, 6, 9, 14, and 15 are allowable, among other reasons, for depending directly or indirectly from independent claim 1, which is allowable. Furthermore, as Kirkpatrick, like Klesius and Rozzo, is devoid of any teaching or suggestion that transfer factor may be present in an extract of an egg, Kirkpatrick does not remedy the aforementioned deficiencies of Klesius and Rozzo. Therefore, the limited teachings of Klesius, Rozzo, and Kirkpatrick do not support a *prima facie* case of obviousness against any of claims 3, 4, 6, 9, 14, or 15.

Withdrawal of the 35 U.S.C. § 103(a) rejections of claims 1-16 and 18-22 is respectfully solicited, as is the allowance of each of these claims.

CONCLUSION

It is respectfully submitted that each of claims 1-16 and 18-23 is allowable. An early notice of the allowability of each of these claims is respectfully solicited, as is an indication that the above-referenced application has been passed for issuance. If any issues preventing allowance of the above-referenced application remain which might be resolved by way of a telephone conference, the Office is kindly invited to contact the undersigned attorney.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brick G. Power", written over the typed name.

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